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No. 02-995

IN THE

# Supreme Court of the United States

BERWIND CORPORATION,
*Petitioner*,

v.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF IN OPPOSITION FOR THE TRUSTEES OF THE UMWA COMBINED BENEFIT FUND AND THE TRUSTEES OF THE UMWA 1992 BENEFIT PLAN

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## QUESTION PRESENTED

Petitioner Berwind Corporation ("Berwind") is the parent company of Reitz Coal Company, a coal company that signed collective bargaining agreements with the United Mine Workers of America ("UMWA"), including the National Bituminous Coal Wage Agreements ("NBCWAs") of 1974, 1978, and 1981, and that remains a wholly-owned subsidiary of Berwind.

The question presented is whether the court of appeals correctly sustained application of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.* (the "Coal Act"), to Berwind, which, though not itself a post-1974 NBCWA signatory, is a statutory "related person" to another coal company that signed post-1974 NBCWAs. In other words, the question is whether Congress correctly concluded in the Coal Act that neither the Due Process Clause nor the Takings Clause of the Fifth Amendment presents any obstacle to treating Berwind and its related person as a single controlled group for purposes of assessing liability for retiree health care under the statute.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 307 F.3d 222. The October 15, 2002 order of the district court amending its opinion to substitute "Coal Act" for "Coat Act" in one sentence of the opinion is reprinted at Pet. App. 42a-44a. The March 31, 2000 opinion of the district court (Pet. App. 45a-79a) is reported at 94 F. Supp. 2d 597. The September 15, 2000 opinion of the district court (Pet. App. 80a-90a) is not reported.

## STATUTE INVOLVED

This case concerns the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.* (the "Coal Act"), as applied to Petitioner Berwind Corporation ("Berwind"). Berwind does not reproduce the

statute in full in its submission. Among other things, it omits the prefatory provisions of the Coal Act that set forth Congress' findings and declaration of policy. Accordingly, the complete Coal Act is reproduced as an appendix to this brief.

## STATEMENT OF THE CASE

In 1992, Congress passed the Coal Act to ensure the continuation of health benefits for retired coal miners and their families. Shortly after enactment of the Coal Act, Petitioner Berwind, along with several other coal companies, challenged the constitutionality of the statute. *Templeton Coal Co., et al. v. Shalala*, 882 F. Supp. 799 (S.D. Ind. 1995). Berwind and the other plaintiffs argued (as Berwind does again here) that the Coal Act violated both the Takings Clause and the Due Process Clause of the Fifth Amendment as applied to them. The district court rejected the claim. *Id.* The court of appeals affirmed, and this Court denied certiorari. *Davon, Inc. et al. v. Shalala*, 75 F.3d 1114 (7th Cir.), *cert. denied*, 519 U.S. 808 (1996).

Now, in this new lawsuit, Berwind again seeks to shed its liability under the Coal Act. In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a divided Court held one provision of the Coal Act unconstitutional as applied to the petitioner in that case. The plurality and concurring opinions in *Eastern* held that Section 9706 (a)(3) of the statute, 26 U.S.C. § 9706 (a)(3), is unconstitutional as applied to a company that left the coal business in 1965, did not sign any collective bargaining agreement with the UMWA after that time, and was not a statutory "related person" to any company that signed a National Bituminous Coal Wage Agreement ("NBCWA") in 1974 or thereafter. Berwind now tries to shoehorn itself into the mold of the petitioner in *Eastern*. As the court of appeals correctly recognized, however, Berwind and Eastern are not similarly situated, and Berwind's reliance on *Eastern* is misplaced.

In contrast to the petitioner in *Eastern*, Berwind is a statutory "related person" to a company that signed the 1974, 1978, and 1981 NBCWAs. Congress decided in the Coal Act to treat a controlled group of corporations – a signatory operator and all of its related persons – as a single entity for purposes of assessing health care liability. *See, e.g.*, 26 U.S.C. §§ 9701(c)(2)(A)(i); 9706(b)(1)(A). Congress rationally determined that all entities in a corporate family should be responsible for the health care commitments that any of those entities made. As a signatory to the 1974, 1978, and 1981 NBCWAs, Reitz (operating under Berwind's control) made commitments regarding lifetime health care not only to its own former employees, as Berwind says (Pet. 11), but also to *all* of the beneficiaries of the collectively bargained UMWA multiemployer health care plans then in existence, including Berwind's own retirees. That is the nature of a multiemployer plan. Particularly in these circumstances, there is nothing surprising or irrational about the legislative decisions in the Coal Act to hold the entire Berwind corporate family liable for participating in the statutory solution to the financial crisis that afflicted the UMWA plans.

Contrary to Berwind's characterization, therefore, this case does not involve the question whether an administrative agency or the court of appeals can "nullify" or "override" a constitutional ruling of this Court. *See* Pet. 7, 10. Rather, the issue here is whether the congressional decision to treat all members of a corporate control group as a single entity for purposes of Coal Act liability violates the Takings Clause or the Due Process Clause of the Fifth Amendment. The court of appeals properly concluded that it does not, and that decision does not raise any legal issue warranting review by this Court.

## I. History and Structure of the Coal Act

The history of the events leading to enactment of the Coal Act has been reviewed at length by this Court and others. *Barnhart v. Peabody Coal Co.*, 123 S. Ct. 748 (Jan. 15, 2003); *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 122 S. Ct. 941, 946-48 (2002); *Eastern Enterprises*, 524 U.S. at 504-15 (plurality opinion); *Holland v. Pardee Coal Co.*, 269 F.3d 424, 427-29 (4th Cir. 2001), *cert. denied*, 123 S. Ct. 986 (Jan. 21, 2003); *Unity Real Estate Co. v. Holland*, 178 F.3d 649 (3d Cir.), *cert. denied*, 528 U.S. 963 (1999); *In re Blue Diamond Coal Co.* (*Blue Diamond Coal Co. v. Shalala*), 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997); *Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688 (3d Cir. 1996).[1] We therefore summarize only those aspects of that background that are relevant here.

### A. History Of The Coal Act

The coal industry and health care for retired coal miners have been subject to extensive government intervention and regulation for more than 50 years. Since the government seized the nation's coal mines in 1946 and entered into the historic Krug-Lewis Agreement that year, retiree health benefits have been provided through a series of collectively bargained multiemployer health plans established under a succession of NBCWAs. The UMWA and the Bituminous Coal Operators'

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1/ *See also Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 335 (1999) (understanding Act's historical background "is essential to a proper interpretation of the Act's present text"); *Edwards v. Aguillard*, 482 U.S. 578, 595 (1987) (Court considers historical context and the specific sequence of events leading to statute's passage).

Association, Inc. ("BCOA"), a multiemployer bargaining association, have negotiated these NBCWAs since 1951. As a general matter, these NBCWAs provided for the funding of health benefits for retirees through levies assessed against the coal operators on the basis of the amount of coal mined or the number of covered hours worked under a particular collective bargaining agreement. These levies were paid into a series of trust funds established by the NBCWAs over the years (the "UMWA Plans"). By their nature as multiemployer trusts, the UMWA Plans continued to provide benefits to eligible retirees even if the former employers of such retirees went out of business or otherwise stopped paying into the Plans; in that event, the benefits were financed by the participating coal operators that remained.

During the years preceding passage of the Coal Act, the financial situation of the UMWA Plans grew increasingly precarious. As health care costs increased, coal operators began exiting the coal industry and "dumping" their retirees into the UMWA Plans, where their benefits would be funded by those operators still mining coal. As the number of coal operators contributing to the UMWA Plans decreased, fewer and fewer operators were left to carry the burden of rapidly rising health care costs, not only for their own retirees but also for thousands of retirees with whom none of the remaining contributing operators had ever had any employment relationship. The continued viability of the UMWA multiemployer health care system was cast in serious doubt.

In 1989, the UMWA engaged in a ten-month strike against the Pittston Coal Company, which was resolved only after Secretary of Labor Dole intervened and appointed a mediator. The settlement eventually reached provided, *inter alia*, for the creation of the Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits (the "Coal Commission"), an industry-wide

commission charged with the task of analyzing the retiree health care crisis and recommending solutions.

On November 5, 1990, the Coal Commission issued its report. The Commission declared that the primary objective of any proposed solution should be to ensure the continuation of retiree health benefits. The Commission explained that the collective bargaining process -- limited as it was to companies still mining coal -- was inadequate to provide a long-term solution. Accordingly, the Commission recommended that Congress enact legislation to address the problem. After two years of deliberations on the Coal Commission's report and recommendations, Congress enacted the Coal Act.

### B. Structure Of The Coal Act

The Coal Act has three primary components intended to ensure that retired coal miners and their dependents continue to receive their health benefits and that, to the extent possible, those benefits are financed by the companies that formerly employed the retirees. The first of these components is the Combined Fund.[2]

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2/ The second component of the Coal Act's statutory scheme is the mandated continuation of individual employer health plans maintained by signatories to the 1978 and later NBCWAs. 26 U.S.C. § 9711. The third component is the UMWA 1992 Plan (the "1992 Plan"), which provides benefits (a) to persons who, but for the enactment of the Coal Act, would have been eligible to receive benefits from the UMWA 1950 or 1974 Benefit Plan, but who are not eligible for benefits from the Combined Fund, and (b) to persons who are entitled to receive benefits directly from their former employers but who do not in fact receive such benefits. 26 U.S.C. § 9712. Although the 1992 Plan was a party below

1. The Combined Fund

The Coal Act merged the collectively bargained 1950 and 1974 Benefit Plans into the Combined Fund as of February 1, 1993. *See* 26 U.S.C. § 9702(a)(2). The Combined Fund provides health and death benefits to coal industry retirees and their dependents who, as of July 20, 1992, were eligible to receive, and were receiving, benefits from the 1950 Benefit Plan or the 1974 Benefit Plan. *Id.* § 9703(a), (b)(1), (e), (f).

The coal operators that previously participated in the UMWA Plans are required to finance annual health benefits for those Combined Fund beneficiaries who have been assigned to them by the Commissioner under Section 9706 of the Act. The Coal Act provides a three-tier system of priorities under which the Commissioner assigns Combined Fund beneficiaries. First, the Commissioner assigns retirees to the coal operator (or any "related person") that was a signatory to the 1978 or any later NBCWA and that was the most recent signatory operator to employ the retiree in the coal industry for at least two years.[3] *Id.* § 9706(a)(1). If no such operator is available, the

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and therefore is a respondent here, neither the question presented in the petition nor any of Berwind's arguments addresses the 1992 Plan.

3/ The Act defines a "signatory operator" as "a person which is or was a signatory to a coal wage agreement." 26 U.S.C. § 9701(c)(1). In turn, a "coal wage agreement" is defined as either a NBCWA or any other agreement entered into between the UMWA and an employer in the coal industry that required the provision of health benefits to retirees of such employers or contributions to the 1950 or 1974 Benefit Plans or any predecessor thereof. Under this definition, both Berwind and Reitz are signatory operators. *Id.* § 9701(b)(1).

Commissioner assigns retirees to the signatory operator (or any "related person") that was a signatory to the 1978 or any later NBCWA and was the most recent signatory operator to employ the retiree in the coal industry for any period of time. *Id.* § 9706(a)(2). Third, those retirees not assigned under the first two tiers are assigned to the signatory operator (or "related person") that employed the retiree for the longest period of time, regardless of whether the operator signed NBCWAs in 1978 or later. *Id.* § 9706(a)(3).

The Coal Act also prescribes the method for financing health benefits for so-called "orphan" beneficiaries, those beneficiaries who could not be assigned to any signatory operator. These benefits are financed through statutorily mandated annual transfers of funds from two sources that otherwise would have been unavailable for retiree health care. First, under Section 9705(a) of the Coal Act, Congress directed that a total of $210 million be transferred from the 1950 Pension Plan in equal amounts during the Combined Fund's first three plan years. 26 U.S.C. § 9705(a). These funds were to be used principally to pay for unassigned beneficiaries' health care. Second, under Section 9705(b) of the Coal Act, Congress has provided that, for each Combined Fund fiscal year beginning on October 1, 1995 and thereafter, certain funds will be transferred to the Combined Fund from the Abandoned Mine Reclamation Fund (the "AML Fund") established under the Surface Mining Control and Reclamation Act of 1977. 26 U.S.C. § 9705(b); 30 U.S.C. § 1232(b), (h). These sums are to be used entirely to pay for unassigned beneficiaries' health care.[4] If the various

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4/ In addition to the transfers prescribed in the Coal Act itself, Congress twice has made special appropriations for the Combined Fund. In each case, the appropriation involved an additional transfer from the AML Fund. In particular, on November 29, 1999, Congress, in the Consolidated

transfers prove insufficient to cover the amount of the unassigned beneficiaries premium that otherwise would be assessed under the statute, the assigned operators will be assessed their pro rata share of the unpaid premium for unassigned beneficiaries. 26 U.S.C. §§ 9704(d), 9705(b)(2).

2. Related Person and Controlled Group Liability

In enacting the Coal Act, Congress sought to ensure that coal companies' internal corporate structure and the multiplicity of corporate entities frequently created under a common corporate parent would not be used as a means of evading statutory health care obligations. During the debate on the Coal Act, for example, Senator Wallop placed into the Congressional Record the draft Conference Committee Report, which stated:

> [B]ecause of the complex corporate structures which are often found in the coal industry, the number of

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Appropriations Act of 2000, provided for the special transfer of $68,000,000 in interest credited to the AML Fund "to pay the amount of any shortfall in any premium account for any plan year under the Combined Fund." Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, Title V, 1999 U.S.C.C.A.N. (113 Stat.) 1501, 1501A-214. Then, on October 11, 2000, in the Department of Interior and Related Agencies Appropriations Act of 2001, Congress provided for another transfer of funds, this time "in such amounts as estimated by the trustees of such [Combined] Fund to offset the amount of any deficit in net assets in the Combined Fund through August 31, 2001." Department of Interior and Related Agencies Appropriations Act of 2001, Pub. L. No. 106-291, § 701(a), 2000 U.S.C.C.A.N. (114 Stat.) 922, 1024-25.

> entities made jointly and severally liable for a signatory operator's obligations under the definition of related persons is *intentionally very broad*. . . . Thus, the statute provides that related persons . . . are equally obligated with the signatory operator to pay for continuing health care coverage.

138 Cong. Rec. 34001 (1992) (emphasis added). Congress determined that it was necessary to treat members of corporate families as a single entity for purposes of imposing liability for Coal Act premiums. The statute accomplishes this goal in three ways.

First, the Coal Act permits beneficiary assignments to be made to signatory operators or to their "related persons." 26 U.S.C. § 9706(a). Section 9701 provides that an entity is a related person to a signatory operator if it is: (i) a member of the same "controlled group of corporations" that includes the signatory operator, as that term is defined in 26 U.S.C. § 52(a); (ii) a trade or business under "common control" with a signatory operator, as that term is defined in 26 U.S.C. § 52(b); (iii) any other person who had a partnership interest or joint venture with a signatory operator in a business within the coal industry, if such business employed eligible beneficiaries; or (iv) a successor in interest of any person described in the previous three categories. *Id.* § 9701(c)(2). In turn, Section 52(a) defines "controlled group of corporations" to include, *inter alia*, parent-subsidiary groups, where the parent owns more than 50 percent of the total voting power of all classes of stock in the subsidiary or where the parent owns more than 50 percent of the total value of shares of all classes of stock in the subsidiary. *Id.* §§ 52(a), 1563(a).

The determination of which entities are "related persons" for purposes of the Coal Act is made as of July 20, 1992. 26 U.S.C. § 9701(c)(2)(B). A "related person" thus need not ever

have mined coal or signed any NBCWAs, as long as it satisfies the statutory definition as of the prescribed date. Under this definition, Berwind – which mined coal for decades and which did sign NBCWAs – concedes that it is a "related person" to the post-1974 signatory operator Reitz, and that Reitz is a "related person" to Berwind.

Second, the Coal Act makes all related persons jointly and severally liable for the obligations imposed under the Act. For example, with respect to Combined Fund premiums, Section 9704(a) provides: "[a]ny related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator." 26 U.S.C. § 9704(a); *see also id.* § 9711(c) (individual employer plan obligations); § 9712(4) (1992 Plan obligations).

Finally, the Coal Act aggregates the employment of retirees by each "related person" in a corporate family and treats the related persons as a single employer for purposes of assigning Combined Fund beneficiaries. The statute provides that "[a]ny employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator." 26 U.S.C. § 9706(b)(1)(A). Thus, every member of a controlled group is treated as if it had employed each of the miners that any one member had employed. As a consequence, as long as at least one member of the controlled group signed an NBCWA in 1974 or thereafter, all members of the controlled group are treated as if they had also signed that NBCWA, because employment by any such signatory operator is treated as employment by any related persons to the operator.

## II. Berwind's Involvement In The Multiemployer Health Care System

Berwind and its subsidiaries have mined coal for nearly 90 years. In that time period, Berwind's history of constantly shifting corporate structures provides a textbook example of the concerns later voiced by Congress about the complexity of corporate forms in the coal industry and the potential that such forms could be used to evade federal liabilities. Berwind was incorporated under the name The Berwind-White Coal Mining Company ("Berwind-White") in 1915. J.A. 152.[5] Berwind-White signed the 1950 NBCWA and the 1951, 1952, 1955, 1956, and 1958 amendments thereto. J.A. 160.

In 1963, Berwind-White became the 98% shareholder of Reitz Coal Company, later acquiring the remaining 2% of the outstanding shares and making Reitz Coal Company its wholly-owned subsidiary. J.A. 152-53. Reitz Coal Company was a signatory to the 1950 NBCWA at the time Berwind-White acquired it.[6] J.A. 160.

In 1967, Berwind-White changed its name to the Berwind Corporation. J.A. 152. In 1978, Berwind formed a partnership with Scallop Coal Corporation, an affiliate of Royal

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5/ "J.A." refers to the joint appendix filed in the court of appeals.

6/ The New River and Pocahontas Consolidated Coal Company ("New River") operated coal mines in West Virginia and employed UMWA-represented coal miners until 1961. New River was merged into Berwind-White in September 1964. J.A. 156. New River was a signatory to the 1950 NBCWA, and the 1951, 1952, and 1955 amendments thereto. J.A. 160-61.

Dutch Shell Petroleum Corporation, in which each partner had a 50% interest. The partnership, known as Reitz Coal Associates, was formed for the purpose of marketing coal produced by Reitz Coal Company, which was still under the complete control of Berwind. J.A. 154.

In 1983, Reitz Coal Associates changed its name to Devon Coal Associates. Also in 1983, Reitz Coal Company leased its coal mining assets and coal reserves to the Midlothian Company, which in turn subleased them to Devon Coal Associates. Devon Coal Associates operated the mines owned by Reitz Coal Company and assumed Reitz Coal Company's obligations under the 1981 NBCWA. J.A. 154.

In July 1983, Berwind transferred its 50% interest in the Devon Coal Associates partnership to Old Devon, Inc., a wholly-owned subsidiary of Berwind. Also, Reitz Coal Company changed its name to Reitz Corporation and the Devon Coal Associates partnership changed its name to Reitz Coal Company. J.A. 154.

In May 1992, Old Devon, Inc. purchased the remaining 50% partnership interest in the partnership now known as Reitz Coal Company. As a result, the partnership ceased to exist by operation of law, and all of the partnership's assets and liabilities vested in Old Devon, Inc. J.A. 154-55.

On June 19, 1992, Old Devon, Inc. changed its name to Reitz Coal Company. J.A. 155. This new Reitz Coal Company remained a wholly-owned subsidiary of Berwind. J.A. 127-28. On December 31, 1993, the original Reitz, Reitz Corporation, was dissolved. J.A. 126. Although the constant name changes can prove confusing, the core fact remains that from 1962 until today, Berwind has owned *at least* 98% of the entity originally known as the Reitz Coal Company, an entity which signed the 1974, 1978, and 1981 NBCWAs. *See* Pet. App. 10a-12a.

In accordance with Section 9706(a) of the Coal Act, 1,923 Combined Fund beneficiaries who were previously employed by (or were dependents of persons previously employed by) Berwind or New River were assigned to Berwind by SSA as of February 1, 1993. As of October 1, 1998, the number of beneficiaries assigned to Berwind had dropped to 1,209, primarily due to the high mortality rate of the Combined Fund's elderly beneficiary population. Berwind's monthly liability for the Plan Year 1998 -- the most recent in the record -- was $295,793.93. J.A. 130. Berwind, however, unilaterally ceased making payments in or around July 1998 and, as of May 25, 1999, owed the Combined Fund $3,220,473.81. J.A. 130.

## III. The *Eastern Enterprises* Decision

In *Eastern*, a sharply divided Court held that the Coal Act was unconstitutional as applied to the petitioner there. Eastern was a signatory to each NBCWA (or amendment) executed between 1947 and 1964. In 1963, Eastern began the transfer of its coal operations to a subsidiary, Eastern Associated Coal Corp. ("EACC"). This transfer was completed by 1965. After enactment of the Coal Act, Eastern was assigned under 26 U.S.C. § 9706(a)(3) more than 1,000 Combined Fund beneficiaries based on miners' employment with Eastern prior to 1966 and Eastern's status as the pre-1978 signatory operator for whom the miners had worked for the longest period of time. *Eastern*, 524 U.S. at 516-17 (plurality). Eastern contended that these assignments violated the Takings and Due Process Clauses of the Fifth Amendment.

The plurality concluded that the Coal Act should be reviewed under the Takings Clause, and that it effected an unconstitutional taking as applied to Eastern. 524 U.S. at 522-23 (plurality). Justice Kennedy dissented from the plurality's conclusion that the Takings Clause governed, but concluded that, as applied to Eastern, the Coal Act violated the Due

Process Clause. *Id.* at 539-50 (Kennedy, J., dissenting in part and concurring in the judgment). The four dissenting Justices agreed with Justice Kennedy that the Coal Act should be analyzed under the Due Process Clause, but concluded that it did not violate due process principles. *Id.* at 553-68 (Breyer, J., dissenting). At the same time, although the four Justices in the plurality declined to reach the issue, they expressed serious misgivings "about using the Due Process Clause to invalidate economic legislation." *Id.* at 537 (plurality).

It is undisputed that all nine of the Justices in *Eastern* agreed that the 1974 and subsequent NBCWAs expressly contemplated lifetime health benefits for retired miners and their dependents. 524 U.S. at 509, 530, 535 (plurality), 550 (Kennedy, J., dissenting in part and concurring in the judgment), 553 (Stevens, J., dissenting). The five Justices who combined to declare the Coal Act unconstitutional as applied to Eastern concluded that the negotiation of the 1974 NBCWA was the watershed event in which an explicit reference to lifetime retiree health benefits was first included in the collective bargaining agreement. Because the plurality and Justice Kennedy considered Eastern as an employer that left the coal industry in 1965 and did not sign the 1974 and later NBCWAs, the plurality viewed the Coal Act as imposing a burden on Eastern "unrelated to any commitment that the employer[] made," *id.* at 537, and Justice Kennedy viewed Eastern as "not responsible for the expectation of lifetime health benefits or for the perilous financial condition of the 1950 and 1974 Plans which put the benefits in jeopardy." *Id.* at 550. Because Eastern sold its subsidiary EACC in 1987, well before the July 20, 1992 date for determining "related person" status under the statute, the plurality noted that Eastern's relationship with EACC did not bear on Eastern's liability under the Coal Act. *Id.* at 530. Thus, the Court did not confront any situation in which, as here, a coal operator was a "related person" to, and a member of a

"controlled group" of companies with, one or more other companies that signed the 1974, 1978, and 1981 NBCWAs.

## IV. Proceedings Below

Shortly after this Court issued its decision in *Eastern*, Berwind filed a complaint against the Commissioner, the Combined Fund, and the 1992 Plan challenging the constitutionality of the health care premium assessments as applied to it. Berwind argued that it is identically situated to the petitioner in *Eastern*.

The district court first ruled that Berwind was precluded from relitigating the constitutional claims that previously were resolved against Berwind in the *Templeton/Davon* litigation, but the court then permitted Berwind to achieve the same result through its APA challenge to the Commissioner's refusal to alter Berwind's Combined Fund beneficiary assignments. Pet. App. 62a-71a. In addressing Berwind's APA claim, the district court accepted Berwind's contention that it is identically situated to Eastern.

In doing so, the court accorded insufficient significance to the controlled group liability established in the Coal Act. The court should have treated Berwind and Reitz, by virtue of their membership in the same controlled group of corporations and their status as "related persons" under the Coal Act, as a single entity for purposes of assessing the propriety of their liability under the statute. The court did not expressly address the validity of the Coal Act's adoption of the controlled group approach to liability, but the court treated Berwind's signatory status as independent of that of its wholly owned subsidiary Reitz.

On appeal, the Trustees argued that the Coal Act is constitutional as applied to companies that were part of a

corporate control group that includes both pre-1974 signatories and post-1974 signatories. In these circumstances, it is not material which individual corporate entity employed a particular retiree. The important point is that one or more members of the corporate control group signed the 1974 and later NBCWAs and thus contributed to a legitimate expectation of lifetime health care on the part of all beneficiaries of the multiemployer UMWA Plans.

The court of appeals agreed. Holding that Berwind's "challenge distills down to its claim that it is in a substantially identical position to Eastern Enterprises," the court ruled that Berwind could not meet that standard. Pet. App. 23a. The court stated that although Berwind and Eastern both had subsidiaries that signed a post-1974 NBCWA, Berwind ignored the "obvious and crucial" fact that Eastern divested itself of its subsidiary five years before the enactment of the Coal Act and the July 20, 1992 date for determining "related person" status under the statute. Pet. App. 27a. Thus, the court concluded, "premium liability could not have been imposed on Eastern based on any relationship it had to EACC. This distinction is fatal to Berwind's argument here." Pet. App. 28a.

Observing that Berwind has not challenged the "related person" provisions nor the "controlled group" provisions of the Coal Act (Pet. App. 25a-26a), the court emphasized that Berwind does not claim that retired miners (or their dependents) were "mistakenly assigned" to Berwind under the Coal Act. Rather, Berwind's entire case turns on its assertion that it is "substantially identical" to Eastern. Relying on its own prior decision in *Unity Real Estate*, 178 F.3d at 659, the court concluded that Berwind's position could not be sustained:

> Since Berwind's related person was a signatory to the 1974, 1978 and 1981 NBCWAs, Berwind bears the same responsibility as the *Unity* plaintiffs for creating

> a reasonable expectation of lifetime health benefits and for creating the problem of under-funding that the Coal Act seeks to remedy. Accordingly, we conclude that Berwind is not in a substantially identical position to Eastern Enterprises, and since Berwind's assignments survive our *Unity* substantive due process analysis, the Coal Act is not unconstitutional as applied to Berwind.

Pet. App. 39a-40a (footnotes omitted).

## ARGUMENT

The court of appeals' decision is correct and further review is not warranted. In upholding the validity of the Coal Act as applied to coal operators like Berwind that are statutory "related persons" to companies that signed the 1974 and later NBCWAs, and concluding that such operators are not "substantially identical" to Eastern, the court of appeals reconfirmed the result it had reached in *Shenango Inc. v. Apfel*, 307 F.3d 174 (3d Cir. 2002) *cert. pending*, No. 02-1419 (docketed March 26, 2003); *Unity Real Estate Co.*; and *Anker Energy Corp. v. Consolidated Coal Co.*, 177 F.3d 161 (3d Cir.), *cert. denied*, 528 U.S. 1003 (1999), and also reached the same result as the Fourth Circuit, *see A.T. Massey Coal Company, Inc. v. Barnhart*, 305 F.3d 226 (4th Cir. 2002), *cert. pending*, No. 02-956 (docketed Dec. 23, 2002). As these decisions recognize, *Eastern* does not extend to entities like Berwind. Congress rationally determined that such entities, based on their status as "related persons" to 1974 or later NBCWA signatories, should be treated as part of a single corporate group that collectively made the very commitments that all Members of the Court in *Eastern* regarded as adequate constitutional justification for the exercise of legislative power in the Coal Act. *Eastern* therefore does not entitle Berwind to relief.

## I. *Eastern* Does Not Support Berwind's Position

Berwind's sole argument in support of its petition is that it is, in all material respects, substantially identical to the petitioner in *Eastern*. As the court of appeals correctly held, however, Berwind glosses over "one obvious and crucial distinction" – *Eastern* did not involve the Coal Act's related persons provisions. Pet. App. 27a.

Nonetheless, Berwind tries to dismiss its relationship with Reitz as insignificant. It asserts, incorrectly, that the collective bargaining agreements that Reitz signed involved promises only to Reitz's own employees and no one else. Pet. 11. This betrays a fundamental misunderstanding of the nature of multiemployer plans. Contrary to Berwind's assertion, the commitments made by Reitz, as Berwind's wholly-owned subsidiary, ran to all of the beneficiaries of the UMWA Plans, including Berwind's own retirees and their dependents.

Those commitments, properly attributable to Berwind as parent of the corporate control group, and referring expressly to lifetime health care, are sufficient to sustain the validity of the Coal Act as applied to Berwind. Berwind thus errs in its repeated accusations that the court of appeals relied on the Coal Act's related persons provisions and SSA's beneficiary assignments to "trump," "nullify," "override," "circumvent," "overrule," or "supersede" this Court's decision in *Eastern*. Pet. 6, 7, 10, 13. Neither the court nor SSA did anything of the kind. They simply recognized that Berwind and Eastern are not similarly situated and that Berwind is not entitled to prevail merely by claiming constitutional equivalence to Eastern.

In its effort to avoid the controlled group liability provisions of the Coal Act, Berwind distorts the ruling in *Eastern*. Refusing to recognize that the plurality and Justice Kennedy proceeded under different and non-overlapping

constitutional theories (with the plurality relying on the Takings Clause and Justice Kennedy invoking the substantive component of the Due Process Clause), Berwind attempts to cobble together some sort of least-common-denominator constitutional theory that turns not on any specific constitutional provision but rather on Berwind's own musings about what animated five Justices in *Eastern*. Pet. at 11-12.

Such amalgamation of different constitutional provisions is not the way courts determine the validity of statutes. As the D.C. Circuit explained in rejecting a similar claim that *Eastern* requires that the Coal Act be held generally "unconstitutional:"

> We begin our analysis with a bedrock principle of constitutional adjudication . . . . The Constitution prohibits certain governmental action through specific clauses . . . . Courts do not adjudicate generalized claims of unconstitutionality, but rather resolve constitutional questions by applying these settled doctrines to specific constitutional claims asserted under specific constitutional clauses. . . . We certainly will not apply a takings analysis to resolve a due process challenge or engage in a free-wheeling, non-textual examination of the "constitutionality" of the Coal Act.

*Association of Bituminous Contractors, Inc. v. Apfel ("ABC")*, 156 F.3d 1246, 1253-54 (D.C. Cir. 1998). Berwind's argument suffers from the same flaw.

Indeed, Berwind mounts no independent constitutional attack on the Coal Act; it simply argues that *Eastern* requires that the Coal Act be held unconstitutional as applied to it. Berwind's case thus stands or falls solely on the question of whether *Eastern* mandates the result Berwind seeks. As the court of appeals properly determined, and as numerous courts

have recognized, in decisions that Berwind simply ignores, it does not. *Eastern* did not address the constitutionality of the Coal Act as applied to companies such as Berwind, which are part of a controlled group of corporations including post-1974 NBCWA signatories. *See A.T. Massey Coal Company*, 305 F.3d 226; *Shenango*, 307 F.3d 174; *Unity Real Estate Co.*, 178 F.3d 649; *Holland v. Big River Minerals Co.*, 181 F.3d 597 (4th Cir. 1999), *cert. denied*, 528 U.S. 1117 (2000); *Anker Energy Corp.*, 177 F.3d 161; *Nell Jean Industries, Inc. v. Barnhart*, 224 F. Supp. 2d 10 (D.D.C. 2002); *Wheeling-Pittsburgh Steel Corp. v. Barnhart*, 229 F. Supp. 2d 539 (N.D. W. Va. 2002).

## II. Berwind Is Not Substantially Identical To Eastern

Despite its contention, Berwind is not substantially identical to Eastern. The plurality and concurring opinions in *Eastern* both proceeded on the basis that Eastern had left the coal industry in 1965 and had not signed an NBCWA since 1964. 524 U.S. at 516 (plurality), 550 (Kennedy, J., dissenting in part and concurring in the judgment). By contrast, Reitz signed the 1974, 1978, and 1981 NBCWAs.

Whatever their differences with respect to the pre-1974 NBCWAs, all of the Justices in *Eastern* agreed that the 1974 and subsequent NBCWAs expressly referred to lifetime health benefits. *See, e.g.*, 524 U.S. at 530 (plurality opinion) (the 1974, 1978, and later NBCWAs "first suggest an industry commitment to the funding of lifetime health benefits for both retirees and their family members."); *id.* at 550 (Kennedy, J., dissenting in part and concurring in the judgment) (Eastern "was not responsible for [the beneficiaries'] expectation of lifetime health benefits. . . . As the plurality opinion discusses in detail, the expectation was created by promises and agreements made long after Eastern left the coal business."); *id.* at 553 (Stevens, J., dissenting) (the "implicit agreement [in the industry

to provide retiree health care benefits] was made explicit in 1974"). Berwind does not dispute this.

The 1974, 1978, and subsequent NBCWAs thus created in retired coal miners a reasonable expectation of lifetime health benefits. As the D.C. Circuit said in *ABC*, 156 F.3d at 1257, "[t]he clear implication of each opinion in *Eastern Enterprises* is that employer participation in the 1974 and 1978 agreements represents a sufficient amount of past conduct to justify the retroactive imposition of Coal Act liability (for the dissenting justices, of course, such participation is not even necessary)." Berwind is a statutory "related person" to Reitz which signed the 1974, 1978, and 1981 NBCWAs that fostered an expectation of lifetime coverage. Thus, even according to the plurality opinion and the opinion of Justice Kennedy in *Eastern*, Reitz contributed to the funding problem that Congress legitimately sought to address in the Coal Act.

Nonetheless, Berwind contends that the "related persons" provision should have no bearing on the constitutionality of its beneficiary assignments. Pet. 11. This argument, however, ignores the fact that neither the plurality nor Justice Kennedy in *Eastern* addressed the operation of the "related person" provisions of the statute. It also disregards the central role that "controlled group" liability plays under various statutory schemes, including the Internal Revenue Code and pension and benefits law generally (*see, e.g.*, Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, and the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1132 *et seq.*).

First, because Eastern sold its subsidiary EACC in 1987, five years before the date that Congress chose for determining "related person" status under the Coal Act, the plurality and Justice Kennedy in *Eastern* did not consider the constitutionality

of the "related person" provisions of the statute. The plurality expressly stated that Eastern did not qualify as a related person to a post-1974 signatory employer and that the statute did *not* impose liability on Eastern as a related person to such an employer. As a consequence, neither the plurality nor Justice Kennedy thought it relevant that EACC, while still wholly owned by Eastern, signed the NBCWAs of 1974, 1978, 1981, and 1984. *See, e.g.*, 524 U.S. at 530 (plurality opinion).

Berwind's suggestion that the result in *Eastern* would not have been different if Eastern had been tied to a "related person" under the Coal Act that had signed a 1974 or later NBCWA is simply wrong. Unlike the imposition of liability on Eastern, controlled group liability under ERISA and MPPAA routinely has withstood constitutional attack. *See, e.g., Central States, Southeast and Southwest Areas Pension Fund v. Skyland Leasing*, 691 F. Supp. 6, 27 (W.D. Mich. 1987) (rejecting Takings Clause challenge to controlled group liability under MPPAA), *aff'd*, 892 F.2d 1043 (6th Cir. 1990); *Connors v. Brady-Cline Coal Co.*, 668 F. Supp. 5, 9 n.4 (D.D.C. 1987) (rejecting due process challenge to controlled group liability under MPPAA); *Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 470 F. Supp. 945 (D. Mass. 1979) (rejecting Takings Clause challenge to controlled group liability upon termination of single employer pension plan under 29 U.S.C. § 1362), *aff'd*, 630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981). *See also Branch v. United States*, 69 F.3d 1571 (Fed. Cir. 1995) (sustaining liability of sister banks for each other's debts under FIRREA), *cert. denied*, 519 U.S. 810 (1996); *Meriden Trust & Safe Deposit Co. v. FDIC*, 62 F.3d 449 (2d Cir. 1995) (same). Unless the plurality opinion and Justice Kennedy's opinion in *Eastern* somehow could be said to have overruled *sub silentio* the long line of cases upholding controlled group liability – a proposition that even Berwind does not advance – then controlled group liability is constitutional here as well.

Further, by incorporating "controlled group" liability into the Coal Act, Congress made a rational choice "to apportion liability among all the companies that collectively made the promise" of lifetime health benefits to the affected miners. *In re Chateaugay Corp.*, 53 F.3d 478, 491 (2d Cir.), *cert. denied*, 516 U.S. 913 (1995). The Coal Act holds the entire controlled group liable for the legitimate expectations to which any of the group's members contributed. Through these provisions, Congress sought to collapse internal corporate distinctions and treat such groups of companies under common control as single entities for purposes of liability. Congress decided, in other words, that it should not matter in the financing of retiree health care that the corporate parent, Berwind, has chosen over the years to operate its coal business through one or more subsidiaries, while other coal operators have concentrated all of their coal mining activities in a single corporate entity. The "related person" provisions of the Coal Act simply cut through these corporate forms and impose liability on the overall enterprise. They thus avoid the need to trace the history of shifting entities and to penetrate convoluted structures entirely under private control.

Reitz participated in a collective multiemployer undertaking in the NBCWAs of 1974, 1978, and 1981 that the plurality and Justice Kennedy in *Eastern* viewed as not only continuing, but enhancing, the preexisting multiemployer health care system. All three of those collective bargaining agreements referred explicitly to lifetime health benefits. The commitments undertaken by Reitz (and the other signatories to the 1974 and later NBCWAs) were addressed not only to Reitz's own retirees but to *all* participants in the UMWA multiemployer system (including the retirees of Berwind). Indeed, it is the nature of a multiemployer plan that all participating employers undertake commitments to all beneficiaries of the plan, not just the ones that they employed. As the D.C. Circuit has explained in the context of the coal industry:

> The continual discovery of new coal mines and exhaustion of old ones leads to a very high turnover of employers in the coal industry. Because of this and the mobility of employees, labor and management in the industry have since 1950 worked out a means for assuring workers retirement benefits without linking specific workers to specific employers. They have done this through national, multiemployer agreements .... All coal companies that join the agreements pay into the same health and benefit funds at a specified rate per ton of coal produced, and all eligible employees receive benefits from those funds without reference to the employers they happened to be working for at the time of their retirement.

*Connors v. Link Coal Co.*, 970 F.2d 902, 903 (D.C. Cir. 1992).

There is no constitutional impediment to holding Berwind, as a member of a controlled group that includes Reitz, responsible for the commitments that Reitz made, and there is no constitutional infirmity in assigning Combined Fund beneficiaries to Berwind, an admitted related person to a post-1974 NBCWA signatory. As the court explained in *Robbins v. Pepsi-Cola Metropolitan Bottling Co.*, 636 F. Supp. 641, 663 (N.D. Ill. 1986),

> [w]hen the members of a group of corporations with a common owner take actions which place the entire group within the definition of a withdrawal, then the conduct of that entire group has a significant effect on the overall financial stability of the plan. It is not irrational for Congress to characterize all businesses with a common parent as one ERISA employer, and declare that each member should be responsible for the detrimental effects of his "family's" conduct on the overall stability of the fund.

For the same reasons, it is legitimate for the Coal Act to treat Berwind and Reitz as a single employer and to impose liability on Berwind as a "related person" to a post-1974 NBCWA signatory.

Having rationally decided that controlled group members should be held jointly and severally liable for paying for the expectations that had been created, Congress then had to fix some date for the determination of "related person" status. Although Congress constitutionally could have chosen a different cut-off date, it rationally chose July 20, 1992, a date close to, but slightly before, the date of the statute's enactment. By choosing a date close to the statute's enactment date, Congress enabled the "related person" inquiry to concentrate on contemporary corporate structures and events, rather than seeking to unravel, for hundreds of employers, including Berwind and Reitz, corporate transfers and other transactions long since completed. By choosing a date slightly in advance of the statute's enactment date, Congress avoided the possibility that employers, having learned that legislation might well be imminent, would seek hastily to rearrange their corporate structures and affairs so as to eliminate or reduce their potential liability under the pending legislative proposal. As the draft Conference Committee report explained:

> This date was fixed to insure that parent corporations or other entities related to a signatory company could not evade responsibility for the obligations imposed under the [Coal Act] by divesting themselves of their ownership connection prior to enactment.

138 Cong. Rec. 34002 (1992). This legislative choice does not violate the Due Process Clause or any other provision of the Constitution. *See, e.g., Eastern*, 524 U.S. at 525-26 (plurality

opinion) (citing *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 731 (1984)).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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# APPENDIX

# APPENDIX

## Subtitle C—Health Care of Coal Miners

Sec. 19141. Short Title.

This subtitle may be cited as the "Coal Industry Retiree Health Benefit Act of 1992".

Sec. 19142. Findings and Declaration of Policy.

(a) FINDINGS.—The Congress finds that—

(1) the production, transportation, and use of coal substantially affects interstate and foreign commerce and the national public interest; and

(2) in order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

(b) STATEMENT OF POLICY.—It is the policy of this subtitle

(1) to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry;

(2) to allow for sufficient operating assets for such plans; and

(3) to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

Sec. 19143. Coal Industry Health Benefits Program.

(a) IN GENERAL.—The Internal Revenue Code of 1986 is amended by adding at the end the following new subtitle:

"Subtitle J—Coal Industry Health Benefits

"CHAPTER 99—COAL INDUSTRY HEALTH BENEFITS

"Subchapter A—Definitions of General Applicability

"Sec. 9701. Definitions of General Applicability.

"(a) PLANS AND FUNDS.—For purposes of this chapter—

"(1) UMWA BENEFIT PLAN.

"(A) IN GENERAL.—The term 'UMWA Benefit Plan' means a plan—

"(i) which is described in section 404(c), or a continuation thereof; and

"(ii) which provides health benefits to retirees and beneficiaries of the industry which maintained the 1950 UMWA Pension Plan.

"(B) 1950 UMWA BENEFIT PLAN.—The term '1950 UMWA Benefit Plan' means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired before 1976.

"(C) 1974 UMWA BENEFIT PLAN.—The term '1974 UMWA Benefit Plan' means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired on or after January 1, 1976.

"(2) 1950 UMWA PENSION PLAN.—The term '1950 UMWA Pension Plan' means a pension plan described in section 404 (c) (or a contination thereof), participation in which is substantially limited to individuals who retired before 1976.

"(3) 1974 UMWA PENSION PLAN.—The term '1974 UMWA Pension Plan' means a pension plan described in section 404 (c) (or a continuation thereof), participation in which is substantially limited to individuals who retired in 1976 and thereafter.

"(4) 1992 UMWA BENEFIT PLAN.—The term '1992 UMWA Benefit Plan' means the plan referred to in section 9713A.

"(5) COMBINED FUND.—The term 'Combined Fund' means the United Mine Workers of America Combined Benefit Fund established under section 9702.

"(b) AGREEMENTS.—For purposes of this section

"(1) COAL WAGE AGREEMENT.—The term 'coal wage agreement' means—

"(A) the National Bituminous Coal Wage Agreement, or

"(B) any other agreement entered into between an employer in the coal industry and the United Mine Workers of America that required or requires one or both of the following:

"(i) the provision of health benefits to retirees of such employer, eligibility for which is based on years of service credited under a plan established by the settlors and described in section 404(c) or a continuation of such plan; or

"(ii) contributions to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or any predecessor thereof.

"(2) SETTLORS.—The term 'settlors' means the United Mine Workers of America and the Bituminous Coal Operators' Asociation, Inc. (referred to in this chapter as the 'BCOA').

"(3) NATIONAL BITUMINOUS COAL WAGE AGREEMENT.—The term 'National Bituminous Coal Wage Agreement' means a collective bargaining agreement negotiated by the BCOA and the United Mine Workers of America.

"(c) TERMS RELATING TO OPERATORS.—For purposes of this section

"(1) SIGNATORY OPERATOR.—The term 'signatory operator' means a person which is or was a signatory to a coal wage agreement.

"(2) RELATED PERSONS.—

"(A) IN GENERAL.—A person shall be considered to be a related person to a signatory operator if that person is—

"(i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;

"(ii) a trade or business which is under common control (as determined under section 52 (b)) with such signatory operator; or

"(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

"(B) TIME FOR DETERMINATION.—The relationships described in clauses (i), (ii), and (iii) of subparagraph (A) shall be determined as of July 20, 1992, except that if, on July 20, 1992, a signatory operator is no longer in business, the relationships shall be determined as of the time immediately before such operator ceased to be in business.

"(3) 1988 AGREEMENT OPERATOR.—The term '1988 agreement operator' means—

"(A) a signatory operator which was a Signatory to the 1988 National Bituminous Coal Wage Agreement,

"(B) an employer in the coal industry which was a signatory to an agreement containing pension and health care contribution and benefit provisions which are the same as those contained in the 1988 National Bituminous Coal Wage Agreement, or

"(C) an employer from which contributions were actually received after 1987 and before July 20, 1992, by the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan in connection with employment in the coal industry during the period covered by the 1988 National Bituminous Coal Wage Agreement.

"(4) LAST SIGNATORY OPERATOR.—The term 'last signatory operator' means, with respect to a coal industry retiree, a signatory operator which was the most recent coal industry employer of such retiree.

"(5) ASSIGNED OPERATOR.—The term 'assigned operator' means, with respect to an eligible beneficiary defined in section 9703(f), the signatory operator to which liability under subchapter B with respect to the beneficiary is assigned under section 9706.

"(6) OPERATORS OF DEPENDENT BENEFICIARIES.—For purposes of this chapter, the signatory operator, last signatory operator, or assigned operator of any eligible beneficiary under this chapter who is a coal industry retiree shall be considered to be the signatory operator, last signatory operator, or assigned operator with respect to any other individual who is an eligible beneficiary under this chapter by reason of a relationship to the retiree.

"(7) Business.—For purposes of this chapter, a person shall be considered to be in business if such person conducts or derives revenue from any business activity, whether or not in the coal industry.

"(d) ENACTMENT DATE.—For purposes of this chapter, the term enactment date' means the date of the enactment of this chapter.

"Subchapter B—Combined Benefit Fund

"PART I—ESTABLISHMENT AND BENEFITS

"Sec. 9702. Establishment of the United Mine Workers of America Combined Benefit Fund.

"(a) ESTABLISHMENT.

"(1) IN GENERAL.—As soon as practicable (but not later than 60 days) after the enactment date, the persons described in subsection (b) shall designate the individuals to serve as trustees. Such trustees shall create a new private plan to be known as the United Mine Workers of America Combined Benefit Fund.

"(2) MERGER OF RETIREE BENEFIT PLANS.—As of February 1, 1993, the settlors of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall cause such plans to be merged into the Combined Fund, and such merger shall not be treated as an employer withdrawal for purposes of any 1988 coal wage agreement.

"(3) TREATMENT OF PLAN.—The Combined Fund shall be—

"(A) a plan described in section 302(c)(5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c) (5)),

"(B) an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(l)), and

"(C) a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37)).

"(4) TAX TREATMENT.—For purposes of this title, the Combined Fund and any related trust shall be treated as an organization exempt from tax under section 501(a).

"(b) BOARD OF TRUSTEES.

"(1) IN GENERAL. For purposes of subsection (a), the board of trustees for the Combined Fund shall be appointed as follows:

"(A) one individual who represents employers in the coal mining industry shall be designated by the BCOA;

"(B) one individual shall be designated by the three employers, other than 1988 agreement operators, who have been assigned the greatest number of eligible beneficiaries under section 9706;

"(C) two individuals designated by the United Mine Workers of America; and

"(D) three persons selected by the persons appointed under subparagraphs (A), (B), and (C).

"(2) SUCCESSOR TRUSTEES.—Any successor trustee shall be appointed in the same manner as the trustee being succeeded. The plan establishing the Combined Fund shall provide for the removal of trustees.

"(3) SPECIAL RULES.—

"(A) BCOA.—If the BCOA ceases to exist, any trustee or successor under paragraph (1)(A) shall be designated by the 3 employers who were members of the

BCOA on the enactment date and who have been assigned the greatest number of eligible beneficiaries under section 9706.

"(B) FORMER SIGNATORIES.—The initial trustee under paragraph (1)(B) shall be designated by the 3 employers, other than 1988 agreement operators, which the records of the 1950 UMWA Benefit Plan and 1974 UMWA Benefit Plan indicate have the greatest number of eligible beneficiaries as of the enactment date, and such trustee and any successor shall serve until November 1, 1993.

"(c) PLAN YEAR.—The first plan year of the Combined Fund shall begin February 1, 1993, and end September 30, 1993. Each succeeding plan year shall begin on October 1 of each calendar year.

"Sec. 9703. Plan Benefits.

"(a) IN GENERAL.—Each eligible beneficiary of the Combined Fund shall receive—

"(1) health benefits described in subsection (b), and

"(2) in the case of an eligible beneficiary described in subsection (f)(1), death benefits coverage described in subsection (c).

"(b) HEALTH BENEFITS.

"(1) IN GENERAL.—The trustees of the Combined Fund shall provide health care benefits to each eligible beneficiary by enrolling the beneficiary in a health care services plan which undertakes to provide such benefits on a prepaid risk basis.—The trustees shall utilize all available plan resources to ensure that, consistent with paragraph (2), the coverage under the managed care system shall to the maximum extent feasible be substantially the same as (and subject to the same limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

"(2) PLAN PAYMENT RATES.—

"(A) IN GENERAL.—The trustees of the Combined Fund shall negotiate payment rates with the health care services plans described in paragraph (1) for each plan year which are in amounts which—

"(i) vary as necessary to ensure that beneficiaries in different geographic areas have access to a uniform level of health benefits; and

"(ii) result in aggregate payments for such plan year from the Combined Fund which do not exceed the total premium payments required to be paid to the Combined Fund under section 9704(a) for the plan year, adjusted as provided in subparagraphs (B) and (C).

"(B) REDUCTIONS.—The amount determined under subparagraph (A)(ii) for any plan year shall be reduced—

"(i) by the aggregate death benefit premiums, determined under section 9704(c) for the plan year, and

"(ii) by the amount reserved for plan administration under subsection (d).

"(C) INCREASES.—The amount determined under subparagraph (A)(ii) shall be increased—

"(i) by any reduction in the total premium payments required to be paid under section 9704(a) by reason of transfers described in section 9705,

"(ii) by any carryover to the plan year from any preceding plan year which—

"(I) is derived from amounts described in section 9704 (e)(3)(B)(i), and

"(II) the trustees elect to use to pay benefits for the current year, and

"(iii) any interest earned by the Combined Fund which the trustees elect to use to pay benefits for the current plan year.

"(3) QUALIFIED PROVIDERS.—The trustees of the Combined Fund shall not enter into an agreement under paragraph (1) with any provider of services which is of a type which is required to be certified by the Secretary of Health and Human Services when providing services under title XVIII of the Social Security Act unless the provider is so certified.

"(4) EFFECTIVE DATE.—Benefits shall be provided under paragraph (1) on and after February 1, 1993.

"(c) DEATH BENEFITS COVERAGE.

"(1) IN GENERAL.—The trustees of the Combined Fund shall provide death benefits coverage to each eligible beneficiary described in subsection (f)(1) which is identical to the benefits provided under the 1950 UMWA Pension Plan or 1974 UMWA Pension Plan, whichever is applicable, on July 20, 1992. Such coverage shall be provided on and after February 1, 1993.

"(2) TERMINATION OF COVERAGE.—The 1950 UMWA Pension Plan and the 1974 UMWA Pension Plan shall each be amended to provide that death benefits coverage shall not be provided to eligible beneficiaries on and after February 1, 1993. This paragraph shall not prohibit such plans from subsequently providing death benefits not described in paragraph (1).

"(d) RESERVES FOR ADMINISTRATION.—The trustees of the Combined Fund may reserve for each plan year, for use in payment of the administrative costs of the Combined Fund, an amount not to exceed 5 percent of the premiums to be paid to the Combined Fund under section 9704 (a) during the plan year.

"(e) LIMITATION ON ENROLLMENT.—The Combined Fund shall not enroll any individual who is not receiving benefits under the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of July 20, 1992.

"(f) ELIGIBLE BENEFICIARY.—For purposes of this subchapter, the term 'eligible beneficiary' means an individual who—

"(1) is a coal industry retiree who, on July 20, 1992, was eligible to receive, and receiving, benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or

"(2) on such date was eligible to receive, and receiving, benefits in either such plan by reason of a relationship to such retiree.

"PART II—FINANCING

"Sec. 9704. Liability of Assigned Operators.

"(a) ANNUAL PREMIUMS.—Each assigned operator shall pay to the Combined Fund for each plan year beginning on or after February 1, 1993, an annual premium equal to the sum of the following three premiums—

"(1) the health benefit premium determined under subsection (b) for such plan year, plus

"(2) the death benefit premium determined under subsection (c) for such plan year, plus

"(3) the unassigned beneficiaries premium determined under subsection (d) for such plan year.

Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.

"(b) HEALTH BENEFIT PREMIUM.—For purposes of this chapter—

"(1) IN GENERAL.—The health benefit premium for any plan year for any assigned operator shall be an amount equal to the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries assigned to such operator under section 9706.

"(2) PER BENEFICIARY PREMIUM.—The Secretary of Health and Human Services shall calculate a per beneficiary premium for each plan year beginning on or after February 1, 1993, which is equal to the sum of—

"(A) the amount determined by dividing

"(i) the aggregate amount of payments from the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for health benefits (less reimbursements but including administrative costs) for the plan year beginning July 1, 1991, for all individuals covered under such plans for such plan year, by

"(ii) the number of such individuals, plus

"(B) the amount determined under subparagraph (A) multiplied by the percentage (if any) by which the medical component of the Consumer Price Index for the calendar year in which the plan year begins exceeds such component for 1992.

"(3) ADJUSTMENTS FOR MEDICARE REDUCTIONS.—If, by reason of a reduction in benefits under title XVIII of the Social Security Act, the level of health benefits under the Combined Fund would be reduced, the trustees of the Combined Fund shall increase the per beneficiary premium for the plan year in which the reduction occurs and each subsequent plan year by the amount necessary to maintain the level of health benefits which would have been provided without such reduction.

"(c) DEATH BENEFIT PREMIUM.—The death benefit premium for any plan year for any assigned operator shall be equal to the applicable percentage of the amount, actuarially determined, which the Combined Fund will be required to pay during the plan year for death benefits coverage described in section 9703 (c).

"(d) UNASSIGNED BENEFICIARIES PREMIUM.—The unassigned beneficiaries premium for any plan year for any assigned operator shall be equal to the applicable percentage of the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries who are not assigned under section 9706 to any person for such plan year.

"(e) PREMIUM ACCOUNTS; ADJUSTMENTS.—

"(1) ACCOUNTS.—The trustees of the Combined Fund shall establish and maintain 3 separate accounts for each of the premiums described in subsections (b), (c), and (d). Such accounts shall be credited with the premiums received and debited with expenditures allocable to such premiums.

"(2) ALLOCATIONS.—

"(A) ADMINISTRATIVE EXPENSES.—Administrative costs for any plan year shall be allocated to premium accounts under paragraph (1) on the basis of expenditures (other than administrative costs) from such accounts during the preceding plan year.

"(B) INTEREST.—Interest shall be allocated to the account established for health benefit premiums.

"(3) SHORTFALLS AND SURPLUSES.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), if, for any plan year, there is a shortfall or surplus in any premium account, the premium for the following plan year for each assigned operator shall be

proportionately reduced or increased, whichever is applicable, by the amount of such shortfall or surplus.

"(B) EXCEPTION.—Subparagraph (A) shall not apply to any surplus in the health benefit premium account or the unassigned beneficiaries premium account which is attributable to—

"(i) the excess of the premiums credited to such account for a plan year over the benefits (and administrative costs) debited to such account for the plan year, but such excess shall only be available for purposes of the carryover described in section 9703 (b)(2)(C)(ii) (relating to carryovers of premiums not used to provide benefits ), or

"(ii) interest credited under paragraph (2) (B) for the plan year or any preceding plan year.

"(C) NO AUTHORITY FOR INCREASED PAYMENTS.—Nothing in this paragraph shall be construed to allow expenditures for health care benefits for any plan year in excess of the limit under section 9703 (b)(2).

"(f) APPLICABLE PERCENTAGE.—For purposes of this section

"(1) IN GENERAL.—The term 'applicable percentage' means, with respect to any assigned operator, the percentage determined by dividing the number of eligible beneficiaries assigned under section 9706 to such operator by the total number of eligible beneficiaries assigned under section 9706 to all such operators (determined on the basis of assignments as of October 1, 1993).

"(2) ANNUAL ADJUSTMENTS.—In the case of any plan year beginning on or after October 1, 1994, the applicable percentage for any assigned operator shall be redetermined under paragraph (1) by making the following changes to the assignments as of October 1, 1993:

"(A) Such assignments shall be modified to reflect any changes during the period beginning October 1, 1993, and ending on the last day of the preceding plan year pursuant to the appeals process under section 9706(f).

"(B) The total number of assigned eligible beneficiaries shall be reduced by the eligible beneficiaries of assigned operators which (and all related persons with respect to which) had ceased business (within the meaning of section 9701(c) (6) during the period described in subparagraph (A).

"(g) PAYMENT OF PREMIUMS.

"(1) IN GENERAL.—The annual premium under subsection (a) for any plan year shall be payable in 12 equal monthly installments, due on the twenty-fifth day of each calendar month in the plan year. In the case of the plan year beginning February 1, 1993, the annual premium under subsection (a) shall be added to such premium for the plan year beginning October 1, 1993.

"(2) DEDUCTIBILITY.—Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

"(h) INFORMATION.—The trustees of the Combined Fund shall, not later than 60 days after the enactment date, furnish to the Secretary of Health and Human Services information as to the benefits and covered beneficiaries under the fund, and such other information as the Secretary may require to compute any premium under this section.

"(i) TRANSITION RULES.

"(1) 1988 AGREEMENT OPERATORS.

"(A) 1ST YEAR COSTS.—During the plan year of the Combined Fund beginning February 1, 1993, the 1988 agreement operators shall make contributions to the Combined Fund in amounts necessary to pay benefits and

administrative costs of the Combined Fund incurred during such year, reduced by the amount transferred to the Combined Fund under section 9705(a) on February 1, 1993.

"(B) DEFICITS FROM MERGED PLANS.—During the period beginning February 1, 1993, and ending September 30, 1994, the 1988 agreement operators shall make contributions to the Combined Fund as are necessary to pay off the expenses accrued (and remaining unpaid) by the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, reduced by the assets of such plans as of such date.

"(C) FAILURE.—If any 1988 agreement operator fails to meet any obligation under this paragraph, any contributions of such operator to the Combined Fund or any other plan described in section 404(c) shall not be deductible under this title until such time as the failure is corrected.

"(D) PREMIUM REDUCTIONS.—

"(i) 1ST YEAR PAYMENTS.—In the case of a 1988 agreement operator making contributions under subparagraph (A), the premium of such operator under subsection (a) shall be reduced by the amount paid under subparagraph (A) by such operator for the plan year beginning February 1, 1993.

"(ii) DEFICIT PAYMENTS.—In the case of a 1988 agreement operator making contributions under subparagraph (B), the premium of such operator under subsection (a) shall be reduced by the amounts which are paid to the Combined Fund by reason of claims arising in connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, including claims based on the 'evergreen clause' found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan, and which are allocated to such operator under subparagraph (E).

"(iii) LIMITATION.—Clause (ii) shall not apply to the extent the amounts paid exceed the contributions.

"(iv) PLAN YEARS.—Premiums under subsection (a) shall be reduced for the first plan year for which amounts described in clause (i) or (ii) are available and for any succeeding plan year until such amounts are exhausted.

"(E) ALLOCATIONS OF CONTRIBUTIONS AND REFUNDS.—Contributions under subparagraphs (A) and (B), and premium reductions under subparagraph (D)(ii), shall be made ratably on the basis of aggregate contributions made by such operators under the applicable 1988 coal wage agreements as of January 31, 1993.

"(2) 1ST PLAN YEAR.—In the case of the plan year of the Combined Fund beginning February 1, 1993—

"(A) the premiums under subsections (a)(1) and (a)(3) shall be 67 percent of such premiums without regard to this paragraph, and

"(B) the premiums under subsection (a) shall be paid as provided in subsection (g).

"(3) STARTUP COSTS.—The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall pay the costs of the Combined Fund incurred before February 1, 1993. For purposes of this section, such costs shall be treated as administrative expenses incurred for the plan year beginning February 1, 1993.

"Sec. 9705. Transfers.

"(a) TRANSFER OF ASSETS FROM 1950 UMWA PENSION PLAN.—

"(1) IN GENERAL.—From the funds reserved under paragraph (2), the board of trustees of the 1950 UMWA Pension Plan shall transfer to the Combined Fund—

"(A) $70,000,000 on February 1, 1993,

"(B) $70,000,000 on October 1, 1993, and

"(C) $70,000,000 on October 1, 1994.

"(2) RESERVATION.—Immediately upon the enactment date, the board of trustees of the 1950 UMWA Pension Plan shall segregate $210,000,000 from the general assets of the plan. Such funds shall be held in the plan until disbursed pursuant to paragraph (1). Any interest on such funds shall be deposited into the general assets of the 1950 UMWA Pension Plan.

"(3) USE OF FUNDS.—Amounts transferred to the Combined Fund under paragraph (1) shall—

"(A) in the case of the transfer on February 1, 1993, be used to proportionately reduce the premium of each assigned operator under section 9704(a) for the plan year of the Fund beginning February 1, 1993, and

"(B) in the case of any other such transfer, be used to proportionately reduce the unassigned beneficiary premium under section 9704 (a) (3) and the death benefit premium under section 9704(a) (2) of each assigned operator for the plan year in which transferred and for any subsequent plan year in which such funds remain available.

Such funds may not be used to pay any amounts required to be paid by the 1988 agreement operators under section 9704(i)(1)(B).

"(4) TAX TREATMENT; VALIDITY OF TRANSFER.—

"(A) NO DEDUCTION.—No deduction shall be allowed under this title with respect to any transfer pursuant to paragraph (1), but such transfer shall not adversely affect the deductibility (under applicable provisions of this title) of contributions previously made by employers, or amounts hereafter contributed by employers, to the 1950 UMWA

Pension Plan, the 1950 UMWA Benefit Plan, the 1974 UMWA Pension Plan, the 1974 UMWA Benefit Plan, the 1992 UMWA Benefit Plan, or the Combined Fund.

"(B) OTHER TAX PROVISIONS.—Any transfer pursuant to paragraph (1)—

"(i) Shall not be treated as an employer reversion from a qualified plan for purposes of section 4980, and

"(ii) shall not be includible in the gross income of any employer maintaining the 1950 UMWA Pension Plan.

"(5) TREATMENT OF TRANSFER.—Any transfer pursuant to paragraph (1) shall not be deemed to violate, or to be prohibited by, any provision of law, or to cause the settlors, joint board of trustees, employers or any related person to incur or be subject to liability, taxes, fines, or penalties of any kind whatsoever.

"(b) TRANSFERS FROM ABANDONED MINE RECLAMATION FUND.—

"(1) IN GENERAL.—The Combined Fund shall include any amount transferred to the Fund under section 402(h) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1232(h)).

"(2) USE OF FUNDS.—Any amount transferred under paragraph (1) for any fiscal year shall be used to proportionately reduce the unassigned beneficiary premium under section 9704 (a) (3) of each assigned operator for the plan year in which transferred.

"Sec. 9706. Assignment of Eligible Beneficiaries.

"(a) In GENERAL.—For purposes of this chapter, the Secretary of Health and Human Services shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any

related person with respect to which) remains in business in the following order:

"(1) First, to the signatory operator which—

"(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

"(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

"(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—

"(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

"(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

"(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

"(b) RULES RELATING TO EMPLOYMENT AND REASSIGNMENT UPON PURCHASE.—For purposes of subsection (a)—

"(1) AGGREGATION RULES.—

"(A) RELATED PERSON.—Any employment of a coal industry retiree in the coal industry by a signatory operator, shall be treated as employment by any related persons to such operator.

"(B) CERTAIN EMPLOYMENT DISREGARDED.—Employment with—

"(i) a person which is (and all related persons with respect to which are) no longer in business, or

"(ii) a person during a period during which such person was not a signatory to a coal wage agreement, shall not be taken into account.

"(2) REASSIGNMENT UPON PURCHASE.—If a person becomes a successor of an assigned operator after the enactment date, the assigned operator may transfer the assignment of an eligible beneficiary under subsection (a) to such successor, and such successor shall be treated as the assigned operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the assigned operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. An assigned operator shall notify the trustees of the Combined Fund of any transfer described in this paragraph.

"(c) IDENTIFICATION OF ELIGIBLE BENEFICIARIES.—The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall, by the later of October 1, 1992, or the twentieth day after the enactment date, provide to the Secretary of Health and Human Services a list of the names and social security account numbers of each eligible beneficiary, including each deceased eligible beneficiary if any other individual is an eligible beneficiary by reason of a relationship to such deceased eligible beneficiary. In addition, the plans shall provide, where ascertainable from plan records, the names of all persons described in subsection (a) with respect to any eligible beneficiary or deceased eligible beneficiary.

"(d) COOPERATION BY OTHER AGENCIES AND PERSONS.—

"(1) COOPERATION.—The head of any department, agency, and instrumentality of the United States shall cooperate fully and promptly with the Secretary of Health and

Human Services in providing information which will enable the Secretary to carry out his responsibilities under this section.

"(2) PROVIDING OF INFORMATION.—

"(A) IN GENERAL.—Notwithstanding any other provision of law, including section 6103, the head of any other agency, department, or instrumentality shall, upon receiving a written request from the Secretary of Health and Human Services in connection with this section, cause a search to be made of the files and records maintained by such agency, department, or instrumentality with a view to determining whether the information requested is contained in such files or records. The Secretary shall be advised whether the search disclosed the information requested, and, if so, such information shall be promptly transmitted to the Secretary, except that if the disclosure of any requested information would contravene national policy or security interests of the United States, or the confidentiality of census data, the information shall not be transmitted and the Secretary shall be so advised.

"(B) LIMITATION.—Any information provided under subparagraph (A) shall be limited to information necessary for the Secretary to carry out his duties under this section.

"(3) TRUSTEES.—The trustees of the Combined Fund, the 1950 UMWA Benefit Plan, the 1974 UMWA Benefit Plan, the 1950 UMWA Pension Plan, and the 1974 UMWA Pension Plan shall fully and promptly cooperate with the Secretary in furnishing, or assisting the Secretary to obtain, any information the Secretary needs to carry out the Secretary's responsibilities under this section.

"(e) NOTICE BY SECRETARY.—

"(1) NOTICE TO FUND.—The Secretary of Health and Human Services shall advise the trustees of the Combined

Fund of the name of each person identified under this section as an assigned operator, and the names and social security account numbers of eligible beneficiaries with respect to whom he is identified.

"(2) OTHER NOTICE.—The Secretary of Health and Human Services shall notify each assigned operator of the names and social security account numbers of eligible beneficiaries who have been assigned to such person under this section and a brief summary of the facts related to the basis for such assignments.

"(f) RECONSIDERATION BY SECRETARY.—

"(1) IN GENERAL.—Any assigned operator receiving a notice under section (e)(2) with respect to an eligible beneficiary may, within 30 days of receipt of such notice, request from the Secretary of Health and Human Services detailed information as to the work history of the beneficiary and the basis of the assignment.

"(2) REVIEW.—An assigned operator may, within 30 days of receipt of the information under paragraph (1), request review of the assignment. The Secretary of Health and Human Services shall conduct such review if the Secretary finds the operator provided evidence with the request constituting a prima facie case of error.

"(3) RESULTS OF REVIEW.—

"(A) ERROR.—If the Secretary of Health and Human Services determines under a review under paragraph (2) that an assignment was in error—

"(i) the Secretary shall notify the assigned operator and the trustees of the Combined Fund and the trustees shall reduce the premiums of the operator under section 9704 by (or if there are no such premiums, repay) all premiums paid under section 9704 with respect to the eligible beneficiary, and

"(ii) the Secretary shall review the beneficiary's record for reassignment under subsection (a).

"(B) NO ERROR.—If the Secretary of Health and Human Services determines under a review conducted under paragraph (2) that no error occurred, the Secretary shall notify the assigned operator.

"(4) DETERMINATIONS.—Any determination by the Secretary of Health and Human Services under paragraph (2) or (3) shall be final.

"(5) PAYMENT PENDING REVIEW.—An assigned operator shall pay the premiums under section 9704 pending review by the Secretary of Health and Human Services or by a court under this subsection.

"(6) PRIVATE ACTIONS.—Nothing in this section shall preclude the right of any person to bring a separate civil action against another person for responsibility for assigned premiums, notwithstanding any prior decision by the Secretary.

"(g) CONFIDENTIALITY OF INFORMATION.—Any person to which information is provided by the Secretary of Health and Human Services under this section shall not disclose such information except in any proceedings related to this section. Any civil or criminal penalty which is applicable to an unauthorized disclosure under section 6103 shall apply to any unauthorized disclosure under this section.

"PART III-ENFORCEMENT

"Sec. 9707. Failure to Pay Premium

"(a) GENERAL RULE.—There is hereby imposed a penalty on the failure of any assigned operator to pay any premium required to be paid under section 9704 with respect to any eligible beneficiary.

"(b) AMOUNT OF PENALTY.—The amount of the penalty imposed by subsection (a) on any failure with respect to any eligible beneficiary shall be $100 per day in the noncompliance period with respect to any such failure.

"(c) NONCOMPLIANCE PERIOD.—For purposes of this section, the term 'noncompliance period' means, with respect to any failure to pay any premium or installment thereof, the period—

"(1) beginning on the due date for such premium or installment, and

"(2) ending on the date of payment of such premium or installment.

"(d) LIMITATIONS ON AMOUNT OF PENALTY.—

"(1) IN GENERAL.—No penalty shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the Secretary of the Treasury that none of the persons responsible for such failure knew, or exercising reasonable diligence, would have known, that such failure existed.

"(2) CORRECTIONS.—No penalty shall be imposed by subsection (a) on any failure if—

"(A) such failure was due to reasonable cause and not to willful neglect, and

"(B) such failure is corrected during the 30 day period beginning on the 1st date that any of the persons responsible for such failure knew, or exercising reasonable diligence would have known, that such failure existed.

"(3) WAIVER.—In the case of a failure that is due to reasonable cause and not to willful neglect, the Secretary of the Treasury may waive all or part of the penalty imposed by subsection (a) for failures to the extent that the Secretary

determines, in his sole discretion, that the payment of such penalty would be excessive relative to the failure involved.

"(e) LIABILITY FOR PENALTY.—The person failing to meet the requirements of section 9704 shall be liable for the penalty imposed by subsection (a).

"(f) TREATMENT.—For purposes of this title, the penalty imposed by this section shall be treated in the same manner as the tax imposed by section 4980B.

"PART IV—OTHER PROVISIONS

"Sec. 9708. Effect on Pending Claims or Obligations

"All liability for contributions to the Combined Fund that arises on and after February 1, 1993, shall be determined exclusively under this chapter, including all liability for contributions to the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for coal production on and after February 1, 1993. However, nothing in this chapter is intended to have any effect on any claims or obligations arising in connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, including claims or obligations based on the 'evergreen' clause found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan. This chapter shall not be construed to affect any rights of subrogation of any 1988 agreement operator with respect to contributions due to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of February 1, 1993.

"Subchapter C—Health Benefits of Certain Miners

"PART I—INDIVIDUAL EMPLOYER PLANS

"Sec. 9711. Continued Obligations of Individual Employer Plans.

"(a) COVERAGE OF CURRENT RECIPIENTS.—The last signatory operator of any individual who, as of February 1, 1993, is receiving retiree health benefits from an individual

employer plan maintained pursuant to a 1978 or subsequent coal wage agreement shall continue to provide health benefits coverage to such individual and the individual's eligible beneficiaries which is substantially the same as (and subject to all the limitations of) the coverage provided by such plan as of January 1, 1992. Such coverage shall continue to be provided for as long as the last signatory operator (and any related person) remains in business.

"(b) COVERAGE OF ELIGIBLE RECIPIENTS.—

"(1) IN GENERAL.—The last signatory operator of any individual who, as of February 1, 1993, is not receiving retiree health benefits under the individual employer plan maintained by the last signatory operator pursuant to a 1978 or subsequent coal wage agreement, but has met the age and service requirements for eligibility to receive benefits under such plan as of such date, shall, at such time as such individual becomes eligible to receive benefits under such plan, provide health benefits coverage to such individual and the individual's eligible beneficiaries which is described in paragraph (2). This paragraph shall not apply to any individual who retired from the coal industry after September 30, 1994, or any eligible beneficiary of such individual.

"(2) COVERAGE.—Subject to the provisions of subsection (d), health benefits coverage is described in this paragraph if it is substantially the same as (and subject to all the limitations of) the coverage provided by the individual employer plan as of January 1, 1992. Such coverage shall continue for as long as the last signatory operator (and any related person) remains in business.

"(c) JOINT AND SEVERAL LIABILITY OF RELATED PERSONS.—Each related person of a last signatory operator to which subsection (a) or (b) applies shall be jointly and severally liable with the last signatory operator for the

provision of health care coverage described in subsection (a) or (b).

"(d) MANAGED CARE AND COST CONTAINMENT.—The last signatory operator shall not be treated as failing to meet the requirements of subsection (a) or (b) if benefits are provided to eligible beneficiaries under managed care and cost containment rules and procedures described in section 9712(c) or agreed to by the last signatory operator and the United Mine Workers of America.

"(e) TREATMENT OF NONCOVERED EMPLOYEE.—The existence, level, and duration of benefits provided to former employees of a last signatory operator (and their eligible beneficiaries) who are not otherwise covered by this chapter and who are (or were) covered by a coal wage agreement shall only be determined by, and shall be subject to, collective bargaining, lawful unilateral action, or other applicable law.

"(f) ELIGIBLE BENEFICIARY.—For purposes of this section, the term 'eligible beneficiary' means any individual who is eligible for health benefits under a plan described in subsection (a) or (b) by reason of the individual's relationship with the retiree described in such subsection (or to an individual who, based on service and employment history at the time of death, would have been so described but for such death).

"(g) RULES APPLICABLE TO THIS PART AND PART II.—For purposes of this part and part II—

"(1) SUCCESSOR.—The term 'last signatory operator' shall include a successor in interest of such operator.

"(2) REASSIGNMENT UPON PURCHASE.—If a person becomes a successor of a last signatory operator after the enactment date, the last signatory operator may transfer any liability of such operator under this chapter with respect to an eligible beneficiary to such successor, and such successor

shall be treated as the last signatory operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the last signatory operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. A last signatory operator shall notify the trustees of the 1992 UMWA Benefit Plan of any transfer described in this paragraph.

"PART II-1992 UMWA BENEFIT PLAN

"Sec. 9712. Establishment and Coverage of 1992 UMWA Benefit Plan.

"(a) CREATION OF PLAN.—

"(1) IN GENERAL.—As soon as practicable after the enactment date, the settlors shall create a separate private plan which shall be known as the United Mine Workers of America 1992 Benefit Plan. For purposes of this title, the 1992 UMWA Benefit Plan shall be treated as an organization exempt from taxation under section 501(a). The settlors shall be responsible for designing the structure, administration and terms of the 1992 UMWA Benefit Plan, and for appointment and removal of the members of the board of trustees. The board of trustees shall initially consist of five members and shall thereafter be the number set by the settlors.

"(2) TREATMENT OF PLAN.—The 1992 UMWA Benefit Plan shall be—

"(A) a plan described in section 302 (c) (5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c) (5)).

"(B) an employee welfare benefit plan within the meaning of section 3 (1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(l)), and

"(C) a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37)).

"(b) COVERAGE REQUIREMENT.—

"(1) IN GENERAL.—The 1992 UMWA Benefit Plan shall only provide health benefits coverage to any eligible beneficiary who is not eligible for benefits under the Combined Fund and shall not provide such coverage to any other individual.

"(2) ELIGIBLE BENEFICIARY.—For purposes of this section, the term 'eligible beneficiary' means an individual who—

"(A) but for the enactment of this chapter, would be eligible to receive benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, based upon age and service earned as of February 1, 1993; or

"(B) with respect to whom coverage is required to be provided under section 9711, but who does not receive such coverage from the applicable last signatory operator or any related person,

and any individual who is eligible for benefits by reason of a relationship to an individual described in subparagraph (A) or (B). In no event shall the 1992 UMWA Benefit Plan provide health benefits coverage to any eligible beneficiary who is a coal industry retiree who retired from the coal industry after September 30, 1994, or any beneficiary of such individual.

"(c) HEALTH BENEFITS.

"(1) IN GENERAL.—The 1992 UMWA Benefit Plan shall provide health care benefits coverage to each eligible beneficiary which is substantially the same as (and subject to all the limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

"(2) MANAGED CARE.—The 1992 UMWA Benefit Plan shall develop managed care and cost containment rules which shall be applicable to the payment of benefits under this subsection. Application of such rules shall not cause the plan to be treated as failing to meet the requirements of this subsection. Such rules shall preserve freedom of choice while reinforcing managed care network use by allowing a point of service decision as to whether a network medical provider will be used. Major elements of such rules may include, but are not limited to, elements described in paragraph (3).

"(3) MAJOR ELEMENTS OF RULES.—Elements described in this paragraph are—

"(A) implementing formulary for drugs and subjecting the prescription program to a rigorous review of appropriate use,

"(B) obtaining a unit price discount in exchange for patient volume and preferred provider status with the amount of the potential discount varying by geographic region,

"(C) limiting benefit payments to physicians to the allowable charge under title XVIII of the Social Security Act, while protecting beneficiaries from balance billing by providers,

"(D) utilizing, in the claims payment function 'appropriateness of service' protocols under title XVIII of the Social Security Act if more stringent,

"(E) creating mandatory utilization review (UR) procedures, but placing the responsibility to follow such procedures on the physician or hospital, not the beneficiaries,

"(F) selecting the most efficient physicians and state-of-the-art utilization management techniques, including ambulatory care techniques, for medical services delivered by the managed care network, and

"(G) utilizing a managed care network provider system, as practiced in the health care industry, at the time medical services are needed (point-of-service) in order to receive maximum benefits available under this subsection.

"(4) LAST SIGNATORY OPERATORS.—The board of trustees of the 1992 UMWA Benefit Plan shall permit any last signatory operator required to maintain an individual employer plan under section 9711 to utilize the managed care and cost containment rules and programs developed under this subsection if the operator elects to do so.

"(5) STANDARDS OF QUALITY.—Any managed care system or cost containment adopted by the board of trustees of the 1992 UMWA Benefit Plan or by a last signatory operator may not be implemented unless it is approved by, and meets the standards of quality adopted by, a medical peer review panel, which has been established

"(A) by the settlors, or

"(B) by the United Mine Workers of America and a last signatory operator or group of operators.

Standards of quality shall include accessibility to medical care, taking into account that accessibility requirements may differ depending on the nature of the medical need.

"(d) GUARANTEE OF BENEFITS.—

"(1) IN GENERAL.—All 1988 last signatory operators shall be responsible for financing the benefits described in subsection (c), in accordance with contribution requirements established in the 1992 UMWA Benefit Plan. Such contribution requirements, which shall be applied uniformly to each 1988 last signatory operator, on the basis of the number of eligible and potentially eligible beneficiaries attributable to each operator, shall include:

"(A) the payment of an annual prefunding premium for all eligible and potentially eligible beneficiaries attributable to a 1988 last signatory operator,

"(B) the payment of a monthly per beneficiary premium by each 1988 last signatory operator for each eligible beneficiary of such operator who is described in subsection (b) (2) and who is receiving benefits under the 1992 UMWA Benefit Plan, and

"(C) the provision of security (in the form of a bond, letter of credit or cash escrow) in an amount equal to a portion of the projected future cost to the 1992 UMWA Benefit Plan of providing health benefits for eligible and potentially eligible beneficiaries attributable to the 1988 last signatory operator. If a 1988 last signatory operator is unable to provide the security required, the 1992 UMWA Benefit Plan shall require the operator to pay an annual prefunding premium that is greater than the premium otherwise applicable.

"(2) ADJUSTMENTS.—The 1992 UMWA Benefit Plan shall provide for—

"(A) annual adjustments of the per beneficiary premium to cover changes in the cost of providing benefits to eligible beneficiaries, and

"(B) adjustments as necessary to the annual prefunding premium to reflect changes in the cost of providing benefits to eligible beneficiaries for whom per beneficiary premiums are not paid.

"(3) ADDITIONAL LIABILITY.—Amy last signatory operator who is not a 1988 last signatory operator shall pay the monthly per beneficiary premium under paragraph (1)(B) for each eligible beneficiary described in such paragraph attributable to that operator.

"(4) JOINT AND SEVERAL LIABILITY.—A 1988 last signatory operator or last signatory operator described in paragraph (3), and any related person to any such operator, shall be jointly and severally liable with such operator for any amount required to be paid by such operator under this section.

"(5) DEDUCTIBILITY.—Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

"(6) 1988 LAST SIGNATORY OPERATOR.—For purposes of this section, the term '1988 last signatory operator' means a last signatory operator which is a 1988 agreement operator.

"Subchapter D—Other Provisions

"Sec. 9721. Civil Enforcement.

"The provisions of section 4301 of the Employee Retirement Income Security Act of 1974 shall apply to any claim arising out of an obligation to pay any amount required to be paid by this chapter in the same manner as any claim arising out of an obligation to pay withdrawal liability under subtitle E of title IV of such Act. For purposes of the preceding sentence, a signatory operator and related persons shall be treated in the same manner as employers.

"Sec. 9722. Sham Transactions.

"If a principal purpose of any transaction is to evade or avoid liability under this chapter, this chapter shall be applied (and such liability shall be imposed) without regard to such transaction."

(b) AMENDMENTS TO SURFACE MINING ACT.—

(1) EXTENSION OF FEE PROGRAM.—Section 402 (b) of the Surface Mining Control and Reclamation Act of 1977 (30

U.S.C. 1232(b)) is amended by striking "September 30, 1995" and inserting "September 30, 2004".

(2) TRANSFER TO FUND.—Section 402 of such Act (30 U.S.C. 1232) is amended by adding at the end the following new subsection

"(h) TRANSFER OF FUNDS TO COMBINED FUND.—(1) In the case of any fiscal year beginning on or after October 1, 1995, with respect to which fees are required to be paid under this section, the Secretary shall, as of the beginning of such fiscal year and before any allocation under subsection (g), make the transfer provided in paragraph (2).

"(2) The Secretary shall transfer from the fund to the United Mine Workers of America Combined Benefit Fund established under section 9702 of the Internal Revenue Code of 1986 for any fiscal year an amount equal to the sum of—

"(A) the amount of the interest which the Secretary estimates will be earned and paid to the Fund during the fiscal year, plus

"(B) the amount by which the amount described in subparagraph (A) is less than $70,000,000.

"(3) (A) The aggregate amount which may be transferred under paragraph (2) for any fiscal year shall not exceed the amount of expenditures which the trustees of the Combined Fund estimate will be debited against the unassigned beneficiaries premium account under section 9704(e) of the Internal Revenue Code of 1986 for the fiscal year of the Combined Fund in which the transfer is made.

"(B) The aggregate amount which may be transferred under paragraph (2) (B) for all fiscal years shall not exceed an amount equivalent to all interest earned and paid to the fund after September 30, 1992, and before October 1, 1995.

"(4) If, for any fiscal year, the amount transferred is more or less than the amount required to be transferred, the Secretary shall appropriately adjust the amount transferred for the next fiscal year."

(3) CONFORMING AMENDMENTS.—(A) Section 401(c) of such Act (30 U.S.C. 1231(c)) is amended by striking "and" at the end of paragraph (11), by redesignating paragraph (12) as paragraph (13), and by adding after paragraph (11) the following new paragraph:

"(12) for the purpose described in section 402 (h); and".

(B) Section 402(g) (1) of such Act (30 U.S.C. 1232(g)) is amended by striking "Moneys" and inserting "Except as provided in subsection (h), moneys".